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No. 03-1424

In the Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI, PETITIONER

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner's petition for a writ of habeas corpus, filed in the Central District of Illinois and seeking, among other relief, his release from present, physical confinement in the District of South Carolina, was correctly dismissed on the ground that the proper district in which to file such an action is the District of South Carolina, the district where petitioner is detained and where his immediate custodian is present.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 360 F.3d 707. The order of the district court (Pet. App. 12-26) dismissing petitioner's petition for a writ of habeas corpus is reported at 274 F. Supp. 2d 1003. The order of the district court (Pet. App. 27-32) denying petitioner's motion for reconsideration is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2004. The petition for a writ of certiorari was filed on April 9, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On June 23, 2003, petitioner was designated by President Bush as an enemy combatant and transported from the Central District of Illinois, where he was being held pending criminal charges, to the Naval Consolidated Brig in Charleston, South Carolina, for detention by the Department of Defense as an enemy combatant. See Pet. App. 55-56. The criminal charges against petitioner were dismissed on the government's motion on June 23, 2003, prior to his transfer to South Carolina. Petitioner's counsel in the criminal proceedings subsequently filed a petition for a writ of habeas corpus in the Central District of Illinois, see *id.* at 33, seeking, among other relief, to be released from custody in South Carolina. *Id.* at 52-53. The district court granted the government's motion to dismiss, *id.* at 13, and denied petitioner's motion to reconsider its order of dismissal, *id.* at 27. The court of appeals affirmed. *Id.* at 11.

1. On September 11, 2001, the al Qaida terrorist network launched large-scale, coordinated attacks on the United States, killing approximately 3,000 persons. In response, the President, as Commander in Chief of the armed forces, took steps to protect the country from further threats. Congress authorized the President's use of "force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224. Congress emphasized that the forces responsible for

the September 11 attacks continue to pose an "unusual and extraordinary threat to the national security and foreign policy of the United States," and that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." 115 Stat. 224.

In the late fall of 2001, the President deployed armed forces to Afghanistan to subdue the al Qaida terrorist network and the Taliban regime protecting it. The ongoing military operations in Afghanistan and elsewhere have resulted, *inter alia*, in the destruction of al Qaida training camps, removal of the Taliban regime from power in Afghanistan, and gathering of vital intelligence concerning the plans, operations, and workings of al Qaida and its supporters. Numerous service members have lost their lives and many others have suffered casualties as a result of the military campaign. See generally United States Army, *Operations* (visited June 14, 2004) <www.army.mil/operations/oef>. The al Qaida network and those who support it remain a serious threat to the United States and its interests, as does the risk of a future attack perpetrated through covert infiltration of the United States by enemy belligerents (as were the attacks on September 11, 2001).

2. Petitioner al-Marri is a Qatari national who entered the United States on September 10, 2001, purportedly to pursue a graduate degree in computer science at Bradley University in Peoria, Illinois. Gov't C.A. Br. 3-4; *United States* v. *Al-Marri*, 230 F. Supp. 2d 535, 536 (S.D.N.Y. 2002). He had received a bachelor's degree from Bradley University ten years earlier, in 1991. See Pet. App. 13.

On February 6, 2002, after having been detained in the Central District of Illinois and then transferred to the Southern District of New York as a material wit-

ness in the investigation of the September 11, 2001 attacks, petitioner was charged in a one-count indictment with possession of 15 or more unauthorized or counterfeit access devices with intent to defraud, in violation of 18 U.S.C. 1029(a)(3). Gov't C.A. Br. 4. On January 22, 2003, petitioner was charged in a second, six-count indictment with making false statements to the FBI, in violation of 18 U.S.C. 1001; making false statements in a bank application, in violation of 18 U.S.C. 1014; and using means of identification of another person for the purposes of influencing the action of a federally insured financial institution, in violation of 18 U.S.C. 1028(a)(7). Gov't C.A. Br. 4. On May 12, 2003, without objection from the government, the District Court for the Southern District of New York dismissed both indictments for lack of venue. *Ibid.*

On May 13, 2003, petitioner was presented in New York on a new criminal complaint that had been filed under seal in the Central District of Illinois on May 1, 2003. Gov't C.A. Br. 4. On May 22, 2003, after being returned to the Central District of Illinois, petitioner was indicted by a grand jury in that district. *Ibid.* The new indictment alleged the same offenses that had been alleged in the previous indictments in the Southern District of New York. *Id.* at 4-5.

3. On June 23, 2003, President Bush determined that petitioner was and continues to be an enemy combatant and directed that he be transferred to the control of the Department of Defense. See Pet. App. 55-56; Gov't C.A. Br. 5. Also on June 23, 2003, the Department of Justice requested that the district court dismiss the charges against petitioner with prejudice, and the district court did so that same day. Pet. App. 55-56; see Pet. C.A. Br. 9. Immediately thereafter, petitioner moved the district court to stay the case and to prevent

his transfer from the Central District of Illinois. The district court denied that motion on the ground that the case had already been dismissed with prejudice and, thus, the court lacked authority to issue such an order. That same day, consistent with the handling of other detainees designated by the President as enemy combatants and held in this country, petitioner was transferred under the exclusive control of the United States military to the Naval Consolidated Brig in Charleston, South Carolina, for detention and questioning. Gov't C.A. Br. 5.

4. Approximately two weeks later, on July 8, 2003, petitioner's counsel filed on petitioner's behalf a petition for a writ of habeas corpus in the Central District of Illinois. See Pet. App. 33-54. The habeas petition sought several declarations of law, including that (1) petitioner was being held in violation of the Constitution, laws, and treaties of the United States; (2) the President's designation of petitioner as an enemy combatant was "invalid as a matter of law"; (3) "the President's Military Order of November 13, 2001, which purports to establish military commissions for offenses committed on United States soil, is null and void"; and (4) to the extent that the same military order "purport[ed] to suspend the Writ of Habeas Corpus" or otherwise restricted federal courts from reviewing his detention, that order was "null and void." *Id.* at 52-53. The habeas petition also sought an order "direct[ing] Respondent Rumsfeld to release Petitioner from custody." *Id.* at 52. Finally, the petition sought injunctive relief pending resolution of the petition, including that petitioner be given direct access to counsel and that he not be interrogated outside the presence of counsel. *Id.* at 52-53.

On July 16, 2003, the government filed a motion to dismiss the habeas petition. The government argued that the District of South Carolina, where petitioner was detained, not the Central District of Illinois, was the proper venue for the habeas action. Gov't C.A. Br. 6-7; Gov't Mot. to Dismiss 19-20. The government further argued that the petition was jurisdictionally infirm because the district court lacked territorial jurisdiction over the detainee's immediate custodian, respondent Commander Melanie A. Marr, who was present only in the District of South Carolina. Gov't C.A. Br. 7; Gov't Mot. to Dismiss 10-15.[1] Finally, the government argued that 28 U.S.C. 2242 specifies that the petition must be signed either by the detainee himself or by someone with "next friend" standing to bring the petition on the detainee's behalf, and that the petition in this case satisfied neither requirement. Gov't C.A. Br. 7; Gov't Mot. to Dismiss 6-10.

On August 1, 2003, after holding a hearing on the government's motion to dismiss, the district court granted the motion on the ground that the petition had been filed in an improper venue. Pet. App. 12-26. The district court relied on Seventh Circuit decisions establishing that the proper forum for a habeas petition is generally the federal district court in which the petitioner is detained. *Id.* at 19-20 (citing, *inter alia*, *Samirah* v. *O'Connell*, 335 F.3d 545 (7th Cir. 2003), cert. denied, No. 03-1085 (June 7, 2004); *Mikolon* v. *United States*, 844 F.2d 456, 461 (7th Cir. 1988); *United States* v. *Mittelsteadt*, 790 F.2d 39, 40 (7th Cir. 1986); *Hanahan* v. *Luther*, 760 F.2d 148, 151 (7th Cir. 1985)).

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[1] In addition to Commander Marr, petitioner's habeas petition named as respondents President George W. Bush and Secretary of Defense Donald H. Rumsfeld. Pet. App. 33.

The district court reasoned that "the question * * * [is] whether there is anything about this case that compels the Court to depart from the general rule." Pet. App. 21. Analyzing the facts of the case, the district court concluded "[s]omewhat regretfully * * * that the answer is no." *Ibid.* In particular, the court observed that "the Central District of Illinois has no real relationship to [petitioner's] present confinement other than the fact that he was physically present in this District prior to his arrest and at the time that he was taken into military custody after having been declared an enemy combatant. His family is no longer in this District or even in the United States, and his lead counsel * * * are located in Newark, New Jersey. His involvement as a criminal defendant in this Court ceased with the dismissal of all charges against him prior to his transfer into military custody, and the fact that he had been a defendant in this Court prior to the time that he was removed from the district is only tangentially related to the circumstances of his present confinement in military custody. There is likewise no indication that any Respondent is physically present within or has been served in the Central District." *Id.* at 18-19.

In addition, the district court found that the nature of the relief requested by the petition did not overcome the general rule that a habeas petition normally should be filed in the district in which the petitioner is detained. Indeed, the district court emphasized that all of the relief sought in the habeas petition related either to "actions taken in the District of Columbia" or "to the conditions and circumstances of his confinement in South Carolina." Pet. App. 24-25. The requested relief therefore "does nothing to tie venue to th[e] [Central District of Illinois]," and petitioner's claims "have no

relationship whatsoever with [that district]." *Ibid.* Accordingly, after ascertaining that petitioner's counsel preferred to have the petition dismissed rather than have the case transferred to the District of South Carolina, the district court dismissed the petition without prejudice. *Id.* at 26.

6. On August 25, 2003, the district court denied petitioner's motion for reconsideration. Pet. App. 27-32. The court rejected petitioner's contention that it had erred in holding that the District of South Carolina was the proper venue without first determining whether jurisdiction was proper in the Central District of Illinois. The court noted that petitioner's "counsel indicated [at the hearing on the motion to dismiss] that they had no objection to proceeding first with the venue issues," and that in any event, it was not true that venue could not be decided prior to jurisdictional issues. *Id.* at 28 (citing *Leroy* v. *Great Western United Corp.*, 443 U.S. 173, 180 (1979)).

The court also rejected petitioner's contention that there was a conflict between the Seventh Circuit's decision in *Mittelsteadt*, *supra*, and this Court's holding in *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484 (1973). The court explained that petitioner's case arose in a very different posture than *Braden*, a case in which a prisoner who was incarcerated in one State was permitted to challenge a legal detainer issued by another State. Pet. App. 30. Moreover, the district court noted that *Braden* made clear that traditional principles of venue continued to play a pivotal role in selecting the proper forum for habeas actions, *ibid.*, and that although the instant case arose in the unusual circumstance of an enemy combatant designation, "it nevertheless involves a classic use of the writ of habeas corpus to challenge his present physical detention in

South Carolina," *id.* at 32. Accordingly because petitioner was being held in a remote district, did not have substantial ties with the Central District of Illinois, and was not seeking relief that was tied to the Central District of Illinois, the district court concluded that "traditional principles of venue * * * compel the result reached by the Court in dismissing the present Petition." *Ibid.*

7. The court of appeals unanimously affirmed. Pet. App. 1-11. In an opinion by Judge Easterbrook, the court rejected both petitioner's argument that someone other than his immediate custodian, Commander Marr, was a proper respondent in the habeas action, and his argument that the district court had jurisdiction to grant a habeas petition directed to a respondent outside the court's territorial district. The court held that the proper respondent in a habeas action is the person exercising day-to-day custody of the petitioner, not a person who authorizes custody. *Id.* at 3. The court also ordered the removal of the President's name from the caption of the case, noting that "[s]uits contesting actions of the executive branch should be brought against the President's subordinates." *Id.* at 2 (citing *Franklin* v. *Massachusetts*, 505 U.S. 788, 803 (1992) (plurality opinion)).

The court also rejected petitioner's claim that the phrase "within their respective jurisdictions" in Section 2241(a) authorized the district court to exercise habeas jurisdiction wherever personal jurisdiction over the respondent could be established. The court reasoned that "[a]n official-capacity suit such as this is against the office, not the person, and every federal office has 'contacts' with the whole United States of America." Pet. App. 4. Thus, if petitioner's reading of 28 U.S.C. 2241(a) were correct, it would render nugatory a num-

ber of habeas provisions, including Section 2241(d), which provides that a habeas petitioner held in a multiple-district State may challenge his sentence in the district of that State where it was imposed even if he is incarcerated in another district of the State. Pet. App. 5-6.[2]

In so holding, the court of appeals disagreed with two recent decisions of other courts of appeals, *Padilla* v. *Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), cert. granted, 124 S. Ct. 1353 (2004) (oral argument heard April 28, 2004), and *Ali* v. *Ashcroft*, 346 F.3d 873 (9th Cir. 2003), in which the Second and Ninth Circuits held that a cabinet officer (as opposed to petitioner's immediate custodian) may be a proper respondent in a habeas action under 28 U.S.C. 2241 when that officer plays or has played a significant role in authorizing petitioner's detention. The court explained that those decisions "conflate the person responsible for authorizing custody with the person responsible for maintaining custody. Only the latter is a proper respondent." Pet. App. 7-8. Thus, "[i]f *Padilla* and *Ali* were correct then the prosecutor, the trial judge, or the governor would be named as respondents in post-conviction proceedings under § 2241 and § 2254; yet no one believes that to be a sound understanding of these statutes." *Ibid.*

The court of appeals also criticized the Second and Ninth Circuit's understanding of this Court's decision in *Braden*. The court of appeals explained:

> What *Padilla* and *Ali* hold, and what al-Marri maintains, is that once *Braden* severed the link between physical detention and "custody," anyone with legal authority to influence the physical custodian's ac-

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[2] The court of appeals made a similar observation with regard to 28 U.S.C. 2255. See Pet. App. 5.

> tions may be the respondent, and thus the litigation may be conducted against a Cabinet officer in any district. That's a non sequitur. *Braden* did not hold that litigation about the Kentucky indictment could occur everywhere. It held instead that multiple ongoing custodies imply multiple custodians. * * * [*Braden*] does not imply that, when there is only one "custody" taking the form of physical detention, anyone other than the warden or equivalent official is a proper respondent.

Pet. App. 9.

DISCUSSION

On February 20, 2004, this court granted review in *Rumsfeld* v. *Padilla*, No. 03-1027, to decide, among other issues, whether a petition for a writ of habeas corpus filed pursuant to 28 U.S.C. 2241 and which challenges a designated enemy combatant's present physical detention and the conditions of his confinement was properly filed in the Soutnern District of New York when both the petitioner and his immediate custodian were located in the District of South Carolina. See 124 S. Ct. 1904; 03-1027 Pet. at I. Resolution of that matter will require the court to determine who is the proper respondent in such a habeas action and whether section 2241 provides habeas courts authority to grant relief concerning custodians outside their territorial districts. Petitioner in this case seeks review of those same questions. Therefore, this case should be held pending the Court's decision in *Rumsfeld* v. *Padilla*, No. 03-1027, and disposed of in accordance with the decision in that case.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Rumsfeld* v. *Padilla*, No. 03-1027, and disposed of in accordance with the Court's decision in that case.

Respectfully submitted.

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